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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MANUEL ARSENIO JACQUEZ, JR., Defendant and Appellant.	E070761 (Super.Ct.Nos. INF1700102 & INF1600721 & INF1702096) OPINION

APPEAL from the Superior Court of Riverside County. Mark Mandio, Judge. Affirmed in part; reversed in part with directions.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Kristine A. Gutierrez and Michelle Ryle, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Manuel Arsenio Jacquez Jr., was found with a stolen 1996 Honda Accord at what appeared to be a chop shop. Inside the trunk of the vehicle was a pressure washer that had been taken that morning from an open garage. Defendant was found guilty of burglary; unlawfully driving a vehicle with two prior theft convictions involving a vehicle; and receiving a stolen vehicle with two prior theft convictions involving a vehicle.

Defendant makes the following claims on appeal: (1) the admission of evidence of two other acts involving stolen vehicles was more prejudicial than probative in violation of his rights of due process and a fair trial; (2) the trial court abused its discretion by refusing to strike his prior strike conviction pursuant to *People v. Superior Court (Romero)* 13 Cal.4th 497 (*Romero*); (3) his conviction of felony receiving a stolen vehicle pursuant to Penal Code section 496d[1] should be reduced to a misdemeanor under Proposition 47; and (4) he is entitled to remand for resentencing in order for the trial court to exercise its discretion to dismiss his prior serious conviction found true under section 667, subdivision (a), pursuant to Senate Bill No. 1393. We vacate defendant's sentence and remand to the trial court to exercise its discretion to strike defendant's prior serious felony conviction; we otherwise affirm the judgment.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

Defendant was found guilty in count 1 of burglary. (Pen. Code, § 459.) In count 2, he was found guilty of unlawful driving of a vehicle with two prior theft convictions involving a vehicle. (Pen. Code, § 666.5, subd. (a), Veh. Code, § 10851). In count 3, defendant was found guilty of receiving a stolen vehicle with two prior theft convictions involving vehicles, a felony. (Pen. Code, §§ 496d, subd. (a), 666.5, subd. (a).)

In a bifurcated proceeding, the trial court found true that defendant had suffered one prior serious and/or violent felony conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)); one prior serious conviction (§ 667, subd. (a)(1)); and served two prior prison terms (§ 667.5, subd. (b)). Defendant was sentenced to 13 years in state prison, which included the imposition of a five-year sentence for the prior serious conviction found true pursuant to section 667, subdivision (a).

B. FACTUAL HISTORY

1. *CURRENT OFFENSE*

On May 6, 2016, Jose Jesus Barajas reported to the police that his 1996 Honda Accord (Barajas's Honda) was stolen from the front of his house in Coachella. He did not give anyone permission to take his car. He did not know Martha Durinzi or defendant.

On May 13, 2016, Ruben Reyes was at his home in Coachella; he had left the garage open and a pressure washer that he kept in the garage was stolen. Reyes did not observe the pressure washer being stolen but he obtained security footage from his

neighbor, who had a camera that pointed at Reyes's house. The surveillance footage showed that between 10:17 a.m. and 10:18 a.m., a silver Honda drove by Reyes's residence two times. The car stopped at a stop sign down the road and backed up to the curb near Reyes's house. A man entered Reyes's garage, exited with the pressure washer and put it in the Honda. The man then drove off, driving through the stop sign down the street without stopping. Reyes did not give anyone permission to enter his garage and take his pressure washer. He did not know defendant or Durinzi.

On May 13, at approximately 5:15 p.m., Riverside County Sheriff's Deputy Phillip Lorton was called to a residence located on Desert Cactus Drive in Thermal, based on a report that cars were being stripped for parts at the location. When he arrived at the residence, there were approximately seven cars in front of the residence, which appeared to have parts taken out of them, or were being worked on. Miguel Lopez was in front of the residence working on one of the vehicles. Lopez let him and another deputy into the property. Deputy Lorton proceeded to the backyard where he found two more cars, including Barajas's Honda.

Defendant and Durinzi had been standing by Barajas's Honda when Deputy Lorton first drove up. Defendant and Durinzi walked away from the vehicle and into the house. They were ordered out of the house and, after a few minutes, eventually complied.

The back license plate on Barajas's Honda had been changed and the stereo was missing. Defendant's fingerprints were not found in Barajas's Honda. A pressure

washer was in the trunk. Reyes identified the pressure washer in the trunk of the Honda as belonging to him.

Lopez lived at the Thermal residence where defendant and Durinzi were arrested. He had seen defendant and Durinzi at the property numerous times. He had not seen the Honda at the property in the morning but saw it once Deputy Lorton arrived. Lopez had seen defendant and Durinzi driving the Honda the prior day.

Indio Police Officer Abraham Plata was part of a special vehicle theft task force. He had been involved in over 1,000 vehicle theft investigations. He explained that car thieves oftentimes will replace the license plate on a stolen vehicle to conceal the true identity of the vehicle. He also noted that 1990s Honda cars were the easiest to steal, and the most common, because it was simple to manipulate the ignition without a key. A simple piece of metal or shaved key could be used to turn the ignition.

2. *OTHER OFFENSES*

a. Theft of Honda Accord on June 1, 2016

The morning of June 1, 2016, Elva Flores realized that her 1995 Honda Accord had been stolen, despite her taking the battery out of the car to deter any potential car thieves. When she got the car back, it had a different battery.

On that same day, at approximately 7:30 a.m., Indio Police Officer Andres Meraz responded to a residence on Taft Street in Indio. It had been reported that a man and a woman were outside the residence in a car and appeared to be casing the area. When Officer Meraz was within one-quarter of a mile from the residence, he observed defendant walking down the street. He had previous interactions with defendant and

knew him. Defendant was wearing a white shirt and a black hat. He was carrying black slippers. Defendant was alone.

Officer Meraz viewed video surveillance from the Taft Street residence. The video showed a Honda being parked on Taft Street. The male and female could be seen wiping down the windows and doors. They exited and left the car parked. The male exiting the vehicle was wearing a white shirt, black hat and carrying slippers. In Officer Meraz's opinion, the individuals wiping down the car in the surveillance video were attempting to get rid of any fingerprints left behind.

b. Theft of Honda Prelude on May 29, 2016

On May 29, 2016, Jose Vargas reported that his 1993 Honda Prelude was stolen from his apartment complex in Indio. He did not give anyone permission to drive the Honda Prelude. The next day, the Honda Prelude was found abandoned at a cemetery in Coachella. Inside the vehicle, discharge paperwork from JFK Memorial Hospital (JFK) was found bearing Durinzi's name. Several shaved keys were also found inside.

Video surveillance from JFK was obtained. The video from the hospital showed Durinzi leaving the hospital and a grainy image of a car approaching the hospital around the same time. A security officer at the hospital working on May 30, 2016, recalled that Durinzi was in the emergency room that day. The security officer also recalled that defendant came into the hospital to look for her. The security officer reviewed a six-pack photographic lineup and identified defendant as being present in the hospital on the same day as Durinzi. Defendant pulled up in a car and picked up Durinzi.

Defendant presented no evidence.

DISCUSSION

A. ADMISSION OF EVIDENCE CODE SECTION 1101, SUBDIVISION (B) EVIDENCE

Defendant contends the trial court abused its discretion and violated his due process rights by admitting the two other acts involving stolen vehicles pursuant to Evidence Code section 1101, subdivision (b), to show his intent, knowledge and absence of mistake.

1. *ADDITIONAL FACTUAL BACKGROUND*

Prior to trial, the People brought a motion in limine to introduce evidence that defendant had committed two other acts involving stolen vehicles; Hondas like the one in the instant case, on May 30, 2016, and June 1, 2016. Those cases were also pending against defendant but had not been joined with the instant case. The People argued they were relevant to show a lack of accident or mistake; to demonstrate intent and knowledge; and to demonstrate defendant's modus operandi in possessing stolen Honda vehicles. These crimes were all similar. The probative value outweighed any prejudice.

At the oral hearing on the admission of the other acts evidence, defense counsel acknowledged the two cases were pending against defendant. The People had consolidated those cases but not joined them with the instant case. Defense counsel argued it was implied the People did not believe the other acts were relevant to the instant case based on their choosing not to consolidate the cases. Further, defendant's counsel argued it was propensity evidence. The trial court admitted the other acts evidence only for the purpose of showing intent, knowledge and absence of mistake.

After presentation of the other acts evidence, as detailed *ante*, the trial court gave a limiting instruction. "The People presented evidence that the defendant committed other offenses that were not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met their burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to consider that evidence for the limited purpose of deciding whether: [¶] The defendant acted with intent to deprive the owner of possession or ownership of the vehicle for any period of time as alleged in Count 2; or [¶] The defendant knew that the property had been stolen as alleged in Count 3; or [¶] The defendant's alleged actions were not the result of mistake or accident. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and charged offenses. [¶] Do not consider this evidence for any other purpose. [¶] Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of the crimes alleged in Counts 2 and 3. The People must still prove each beyond a reasonable doubt."

2. *PROBATIVE EVIDENCE*

Only relevant evidence is admissible. (Evid. Code, § 350.) Other uncharged acts are relevant "to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) "To be admissible to show intent, 'the prior conduct and the charged offense need only be sufficiently similar to support the inference that defendant probably harbored the same intent in each instance.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1194; accord *People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*Ewoldt,* at p. 402.)

Under Evidence Code section 352, the probative value of a defendant's other acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

"We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352." (*People v. Cole*, *supra*, 33 Cal.4th at p. 1194.) "[T]he decision on whether evidence . . . is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.] 'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]"

[Citation.]' [Citations.] It is appellant's burden on appeal to establish an abuse of discretion and prejudice." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225.)

The trial court did not abuse its discretion by admitting two other acts wherein defendant was in possession of stolen Hondas. The evidence was highly relevant to the charged offenses and defendant's intent and knowledge were disputed in this case. Initially, the two other acts were similar to the instant offense. All three crimes involved the theft of Honda cars, which were the most common and easiest cars to take. His possession of two other stolen Hondas was relevant to show that he shared the same intent in all three offenses: he sought to possess Hondas that he knew were stolen.

Moreover, defendant's possession of all three Hondas occurred during the same time period, foreclosing any argument these acts were not relevant because they were too remote in time.

Defendant insists that the other acts were not similar and cumulative. However, the three crimes were very similar. In each, a mid-1990s Honda was taken and defendant was seen driving the stolen vehicles. Moreover, the evidence was not cumulative as only two other acts were admitted despite defendant having a long history of automobile thefts.

The probative value was not substantially outweighed by the risk of undue prejudice. Here the evidence that he was in possession of two other stolen Hondas certainly was not more inflammatory than the evidence that defendant was in possession of the stolen Honda in this case, and that stolen property taken by him was in the trunk. The other acts evidence did not involve an undue consumption of time in the trial and

was not cumulative. The trial court did not abuse its discretion by admitting the other acts evidence.

3. *PREJUDICE*

Even if the trial court erred by admitting the prior acts evidence, any conceivable error was harmless. "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, as provided *ante*, the jury was instructed that it could not use the other acts evidence to convict defendant of the instant crime; to determine he had a bad character; or was disposed to commit such crimes. It instructed the jury that it must still find the People had proved the current crimes beyond a reasonable doubt. We must presume the jurors followed the instructions and did not consider the evidence as showing his disposition to commit the current crimes or was the sole evidence relied upon in convicting defendant. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 [jurors are presumed to follow the instructions].)

Moreover, the evidence of defendant's guilt without consideration of the other acts evidence was overwhelming. Defendant was found standing next to Barajas's Honda. Defendant immediately left the car and went inside the home when he saw Deputy Larton. He reluctantly exited the house. The license plate on the Honda had been changed and Lopez testified that he had seen defendant and Durinzi driving in the car.

Additionally, the videotape of the theft of the pressure washer showed a similar car being used; the pressure washer was in the trunk. Strong evidence was presented to support that defendant drove Barajas's Honda, he was aware it was stolen, and he was in possession of it, and that he took the pressure washer from the garage. Any conceivable error committed by the trial court in admitting the other acts evidence was harmless.

B. *ROMERO* MOTION

Defendant contends the trial court abused its discretion by refusing to strike his prior serious and/or felony conviction pursuant to sections 667, subdivisions (c) and (e)(1), and 1170.12, subdivision (c)(1). He insists he does not fall within the spirit of the "Three Strikes" law because his prior conviction did not involve violence and the current offense was a "low-end" burglary. In addition, he has a drug problem and demonstrated family support.

1. *MOTION AND RULING*

Prior to sentencing, defendant filed a *Romero* motion to strike his felony conviction, a gang participation conviction under section 186.22. He argued the vast majority of his prior convictions were non-violent, property related crimes. His crimes did not require any special sophistication or skill. The burglary in the current case involved briefly entering an open garage. The resulting sentence, without the prior enhancement, was sufficient punishment. The People filed opposition. They recounted years of defendant's convictions starting in 2010. Moreover, defendant was awaiting sentencing on three other cases where he had been convicted, including the two automobile crimes admitted as Evidence Code section 1101, subdivision (b) evidence.

Defendant also presented several character letters in support of him being a good father and being employed. He also wrote a letter explaining he had a substance abuse problem.

In ruling on the *Romero* motion, the trial court found in defendant's favor that his prior conviction did not involve violence. However, it found that the prior conviction was part of a continuing history of criminal offenses; the prior conviction was not remote; and that it was not in the interests of society to strike the prior conviction. The trial court recognized that defendant stole cars from persons who suffered from the loss of transportation and were innocent of any contribution to the crime. His past criminal record was "significant." He had not been successful on probation or parole. The trial court denied the *Romero* motion.

2. *ANALYSIS*

A trial court has discretion to dismiss a strike prior under section 1385. (*Romero*, *supra*, 13 Cal.4th at pp. 529-530.) The trial court considers " 'whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' " (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*Carmony*, *supra*, 33 Cal.4th at p. 375.) "This standard is deferential. . . . [I]t asks in substance whether the

ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts." (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

"Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony*, *supra*, 33 Cal.4th at p. 378.)

Defendant has failed to show the trial court's decision was irrational or arbitrary. The trial court meticulously considered the different factors including defendant's background, character and prospects. Defendant had begun committing theft offenses in 2010, having been convicted of a violation of Penal Code section 490.5, petty theft. From 2010 to the instant offense, he committed numerous theft offenses, including burglary, Vehicle Code section 10851 violations, receiving stolen property offenses, vehicle thefts and drug offenses. Although defendant's prior crimes were essentially non-violent crimes, the prior conviction he sought to have stricken was for participation in a criminal street gang.

In addition, defendant continually violated his parole and probation, many times on the same offense. Moreover, he committed the current offense along with two other crimes involving vehicles within the same month. Nothing deterred defendant's continual commission of crimes and there was nothing to support that given a lesser

sentence, he no longer would commit these theft offenses. The trial court did not abuse its discretion by declining to strike defendant's prior serious or violent strike conviction.

C. DEFENDANT'S SECTION 496D CONVICTION SHOULD BE REDUCED TO A MISDEMEANOR

Defendant insists that after Proposition 47, his felony conviction of receiving stolen property with a prior, a violation of section 496d,[2] is a misdemeanor because the People failed to prove the value of the vehicle was more than $950. He contends Proposition 47 should apply equally to receiving stolen property offenses, specifically for vehicle thefts under the value of $950, as it does to theft offenses. The People contend that for a violation of section 496d, the value of the vehicle need not be shown and it is not similar to other theft offenses where the value of the property is less than $950.

In the trial court, while discussing the instructions, the parties referred to section 496d and whether the People had to prove the value of the vehicle. The People insisted they were not required to so prove, and defendant's counsel agreed the prosecutor was correct it did not apply. The jury was not instructed to find the value of the vehicle.

We pause to address the fact that this case was prosecuted after the passage of Proposition 47. Before trial, the parties discussed the fact that section 496d may have been changed by Proposition 47; the prosecutor and defense counsel agreed, based on the state of the law, that proof of the value of the vehicle was not a required element of

[2] Defendant was convicted of a violation of section 666.5 predicated on the violation of section 496d. Section 666.5 is a penalty provision that attaches to an enumerated substantive crime. (*People v. Lee* (2017) 16 Cal.App.5th 861, 869-870.)

section 496d.[3] Section 1170.18 intends that defendants who have been convicted of felonies that were since reduced to misdemeanors by Proposition 47 would file petitions to recall their sentence assuming their convictions were not final. Here, defendant cannot avail himself of the petition procedure as he was not convicted before the passage of Proposition 47.

In *People v. Gutierrez* (2018) 20 Cal.App.5th 847, the defendant was convicted of a felony violation of Vehicle Code section 10851 after the passage of Proposition 47. After his conviction, the California Supreme Court in *People v Page* (2017) 3 Cal.5th 1175 (*Page*) held that Proposition 47 applies to some convictions of violating Vehicle Code section 10851. (*Page*, at p. 1187.) On appeal, the defendant in *Gutierrez* argued that his conviction for unlawful driving or taking a vehicle was a form of vehicle theft, and under Proposition 47 his felony conviction must be reduced to a misdemeanor as the People had the burden of proving that the vehicle taken was valued over $950. (*Gutierrez*, at pp. 849-850, 853.) The People contended that the defendant forfeited his argument that Proposition 47 did not apply to Vehicle Code section 10851 convictions by failing to raise the issue in the trial court. (*Gutierrez*, at p. 855.)

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[3] The trial commenced on March 14, 2018, and sentencing occurred on June 18, 2018. This court issued its opinion in *People v. Varner* (2016) 3 Cal.App.5th 360 (*Varner*) on September 15, 2016, and review was granted on November 22, 2016. In *Varner*, this court held that section 496d was not affected by Proposition 47. Review of *Varner* was dismissed by the California Supreme Court on August 9, 2017. As such, at the time of trial, the law in this district was that section 496d was not affected by Proposition 47.

The appellate court rejected the People's forfeiture argument. It found, "[t]he parties have mistakenly conflated the retrospective and prospective applications of Proposition 47. As discussed, Penal Code section 1170.18 allows individuals who had already been convicted of felonies at the time of Propositions 47's enactment to petition for resentencing if the felony had been reclassified as a misdemeanor. When such a petition has been filed, the defendant bears the burden of proving he or she is eligible for retrospective relief. [Citation.] However, [the defendant] had not even committed the crime charged at the time Proposition 47 went into effect. Thus, relief under Penal Code section 1170.18 is unavailable to him. The issue in this case is not whether [the defendant] could be resentenced under Penal Code section 1170.18, but whether he was properly convicted of a felony violation of section 10851 Vehicle Code. He was not." (*People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 855.) The appellate court concluded, "[B]ecause the People failed to present any evidence at trial regarding the value of the rental car, the felony conviction for violating section 10851, if predicated on vehicle theft, cannot stand." (*Id*. at p. 856.)

Similarly, here, the issue is whether defendant could properly be convicted of a felony violation of section 496d without the People proving the value of the vehicle exceeded $950. As such, the issue has not been forfeited by defendant.

The crime of receiving stolen property has three elements: "(1) the property was stolen; (2) the defendant knew the property was stolen . . .; and, (3) the defendant had possession of the stolen property." (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1425, disapproved on another ground in *People v. Covarrubias* (2016) 1 Cal.5th 838,

874, fn. 14.) It does not involve a taking and is not by definition a theft. (*People v. Gonzales* (2017) 2 Cal.5th 858, 864-865 [defining theft offenses].)

In *Varner*, this court concluded, after setting forth the language of Proposition 47 and that we interpret an initiative the same as statutory language, that Proposition 47 did not apply to section 496d because a violation of section 496d was not a theft offense and is not mentioned in Proposition 47. (*Varner, supra*, 3 Cal.App.5th at pp. 365-367.) We rejected the defendant's argument that the voters intended to include section 496d in section 490.2. We concluded that despite the language in section 490.2, added by Proposition 47, that "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor." (§ 490.2), the language is not properly interpreted to include receiving stolen property. (*Varner*, at p. 367.) While the California Supreme Court will ultimately decide the issue as it has granted review in *People v. Orozco* (2018) 24 Cal.App.5th 667, 674, fn. 2, review granted August 15, 2018, S249495, which relied on *Varner* in concluding that section 496d was not subject to Proposition 47, we follow our decision in *Varner*.

The interpretation in *Varner, supra*, is reasonable even after two California Supreme Court decisions involving Proposition 47. These include the decision in *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*), and the decision in *Page, supra*, 3 Cal.5th 1175. In *Romanowski, supra*, 2 Cal.5th 903, the California Supreme Court found that a violation of section 484e, "theft" of an access card, is a crime of "obtaining any

property by theft" within the meaning of section 490.2, subdivision (a). As such, although section 484e was not specifically included in Proposition 47, voters intended that it be included. Moreover, including the crime served Proposition 47's purpose of reducing nonserious, nonviolent crimes to misdemeanors. (*Romanowski*, at p. 909.)

In *Page*, the California Supreme Court addressed whether a violation of Vehicle Code section 10851 was intended to be included in the Penal Code section 490.2 language of Proposition 47. (*Page*, *supra*, 3 Cal.5th at pp. 1179-1180.) It noted that a violation of Vehicle Code section 10851 could be committed in two distinct ways: by driving and by theft. It concluded that if the violation of Vehicle Code section 10851 involved the theft of a vehicle under the value of $950 it was encompassed under Penal Code section 490.2. (*Id.* at pp. 1183-1184.)

However, this case involves the crime of receiving stolen property not the theft crimes in *Page* and *Romanowski*. Proposition 47 did amend section 496, buying or receiving stolen personal property, to provide that if the defendant receives "any property" that is $950 or less, the offense shall be a misdemeanor except for some ineligible individuals. (§ 496, subd. (a).) However, Proposition 47 did not similarly amend section 496d, receiving a stolen vehicle.

As we found in *Varner*, "Defendant's reliance on the changes made by Proposition 47 to the crimes of grand theft and petty theft do not support that the drafters of Proposition 47 intended to include section 496d. Section 490.2, which was added by Proposition 47, provides a definition of petty theft that affects the definition of grand theft in section 487 and other provisions. Section 490.2 begins with the phrase:

'Notwithstanding Section 487 or any other provision of law defining grand theft. . . .' (§ 490.2) Similarly, section 459.5, which was also added by Proposition 47, and which provides a definition of shoplifting that affects the definition of burglary in section 459, begins with the phrase: 'Notwithstanding Section 459 . . . .' (§ 459.5.) The drafters of Proposition 47 knew how to indicate when they intended to affect the punishment for an offense the proposition was not directly amending. This "notwithstanding" language is conspicuously absent from section 496, subdivision (a). Because that provision contains no reference to section 496d, we must assume the drafters intended section 496d to remain intact and intended for the prosecution to retain its discretion to charge section 496d offenses as felonies. Additionally, Proposition 47 modified both section 496, receiving stolen property, and added section 490.2. If section 490.2 applied to receiving stolen property offenses, there would be no need to amend section 496. The trial court did not err by concluding defendant was ineligible for resentencing based on his conviction of section 496d." (*Varner*, *supra*, 3 Cal.App.5th at p. 367.)

This reasoning equally applies after *Page* and *Romanowski.* This is further evidenced by the reasoning in *Page* that there were differences between driving a vehicle and theft of a vehicle. It specifically restricted the application of Proposition 47 to theft of a vehicle. (*Page*, *supra*, 3 Cal.5th at pp. 1183-1184.) Similarly, here, it is reasonable to distinguish between receiving property under the value of $950, taking property under the value of $950, and receiving a stolen vehicle.

Defendant relies upon *People v. Williams* (2018) 23 Cal.App.5th 641, 644-648 which held Proposition 47 applies to Penal Code section 496d offenses under Penal Code

section 490.2. In *Williams,* the court noted that Penal Code section 496d was not listed in Proposition 47 but that Penal Code section 490.2 was listed. (*Williams*, at pp. 646-647.) Further, the court noted that in *Page* and *Romanowski*, the California Supreme Court applied Proposition 47 to theft crimes, a Vehicle Code section 10851 violation involving theft and theft of access card information, despite not being listed in Proposition 47. It concluded that a violation of Penal Code section 496d was similar to the theft offense of violating Penal Code section 484e and was subject to Proposition 47. (*Williams*, at p. 650.) *Williams* never discussed the implication of *Varner*, which remains published.

Page and *Romanowski* addressed whether certain *theft* offenses come within section 490.2 for resentencing purposes under Proposition 47. Neither suggests that resentencing under section 490.2 extends to *theft-related* offenses. We conclude that *Varner* is better reasoned and reject that defendant's conviction of violating section 496d is a misdemeanor until directed otherwise by the California Supreme Court.

D. SENATE BILL 1393

Defendant argues in his supplemental briefing that he is entitled to remand for resentencing pursuant to Senate Bill No. 1393 (S.B. 1393), which amended sections 667, subdivision (a) and 1385, to allow a trial court to strike enhancements for prior serious felony conviction. Defendant's sentence included a five-year term for his prior serious felony conviction. The People concede defendant is entitled to remand for resentencing.

Effective January 1, 2019, sections 667, subdivision (a) and 1385, subdivision (b), allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.)

Under the prior version of section 667, subdivision (a), which was effective at the time of defendant's sentencing, the court was required to impose a five-year consecutive term for prior serious felony convictions and had no discretion to strike any prior conviction of a serious felony for purposes of enhancement of a sentence. (*Garcia*, at p. 971.) The People concede, and we agree, that the amendment applies to defendant as his case is not final. (*Id.* at pp. 972-973 [S.B. 1393 applies retroactively to all cases not yet final on the effective date].) Accordingly, we vacate defendant's sentence and remand this matter to allow the trial court to exercise its discretion to strike or impose the prior serious felony enhancement.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded for the limited purpose of allowing the trial court to exercise its discretion with respect to S.B. 1393.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

I concur:

McKINSTER
Acting P. J.

[*People v. Jacquez*—E070761]

RAPHAEL, J., Concurring and Dissenting.

With Proposition 47 in 2014, the voters designated as a misdemeanor the crime of receiving stolen property when the value of the property does not exceed $950. They did so by amending the statute that criminalizes receipt of "any property" that is stolen. The voters' guide informed the electorate that receiving stolen property worth $950 or less would "always" be a misdemeanor.

Does the voters' amendment to the *general* receipt of stolen property statute extend to the *specific* statute governing the receipt of a stolen automobile? That is, can the receipt of a stolen car worth no more than $950 still be prosecuted as a felony under the specific statute?

Today's majority follows our 2016 opinion that held that the change to the general statute does not extend to the specific one. This was an arguable conclusion at the time that opinion issued. But we now have new authority. In *People v. Page* (2017) 3 Cal.5th 1175 (*Page*), our Supreme Court held that the $950 felony threshold that the voters enacted as a *general* theft statute applied to a more *specific* theft statute—indeed, one involving theft of an automobile—even though the voters did not expressly state their intent to cover the latter statute.

Given *Page*'s holding as to theft in Proposition 47, we now should abandon our pre-*Page* reasoning as to receipt of stolen property in the same initiative. We have been provided with no sound reason to find the voters' change to receipt of stolen property narrower than their change to theft. I would apply *Page* and hold that the voters intended

in Proposition 47 that a defendant convicted of receiving stolen property with a value that does not exceed $950 is guilty of only a misdemeanor, even if that property happens to be an automobile. I concur in the rest of the majority opinion.

I

THE VOTERS' CHANGE TO PENAL CODE SECTION 496, SUBDIVISION (A)

In November 2014, the voters passed Proposition 47, the Safe Neighborhoods and Schools Act, which "reduced certain drug- and theft-related offenses from felonies or 'wobblers' to misdemeanors." (*People v. Martinez* (2018) 4 Cal.5th 647, 651.) "One of Proposition 47's purposes was to reduce the number of prisoners serving sentences for nonviolent crimes, both to save money and to shift prison spending toward more serious offenses." (*People v. Romanowski* (2017) 2 Cal.5th 903, 907.)

Among the crimes affected was Penal Code section 496, subdivision (a) (section 496(a)), the statute that criminalizes receiving "any property that has been stolen."[1] Before Proposition 47, receiving stolen property worth no more than $950 was a so-called "wobbler" that could be treated as a felony or a misdemeanor. The voters

[1] All further undesignated statutory references are to the Penal Code. Section 496(a) is defined as criminal "[e]very person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained . . . ."

amended the language in section 496(a) to ensure that receiving stolen property of such a low value would be treated only as a misdemeanor.[2]

Consistent with that change, the legislative analysis in the voters' guide stated that receiving low-value stolen property would "always" have misdemeanor treatment: "***Receiving Stolen Property***. Under current law, individuals found with stolen property may be charged with receiving stolen property, which is a wobbler crime. Under this measure, receiving stolen property worth $950 or less would always be a misdemeanor." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35; see *People v. Gonzales* (2017) 2 Cal.5th 858, 870 [looking to voters' guide to discern Proposition 47's meaning].)

Neither the text of Proposition 47 nor the voters' guide provided any further information about the scope of the change to section 496(a). Today's case is about how to interpret that silence when a particular crime is covered not only by the general receipt of stolen property crime defined in section 496(a), but also by a more specifically defined crime, i.e., section 496d, receipt of a stolen automobile.

II

THE CONFLICT BETWEEN SECTIONS 496(A) AND 496D

Based on the text of the Penal Code after Proposition 47, two sections potentially govern a case where the People prosecute a defendant for receiving a stolen vehicle worth

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[2] As amended, the relevant portion of section 496(a) reads: "However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for [certain specified offenses.]"

no more than $950. Section 496(a) requires misdemeanor treatment for the knowing receipt of "any property" stolen with such a low value. Section 496d allows for felony treatment for the knowing receipt of stolen motor vehicles, with no $950 threshold placed in that provision that requires low-value vehicles to be treated differently.

Which statute governs a prosecution of receipt of a stolen automobile worth no more than $950?

We first answered that question in *People v. Varner* (2016) 3 Cal.App.5th 360, 366-367 (*Varner*). In *Varner*, we held that, even after Proposition 47, section 496d, the receipt of stolen vehicle statute, applies to any vehicle, even one worth no more than $950. Under *Varner*, receiving any stolen vehicle may be sentenced as a felony. The principal basis for the decision was that the voters had not amended section 496d, nor had they made clear that they wanted that specific statute to be affected by the initiative. (*Varner, supra,* at pp. 366-367.)

III

PAGE'S RESOLUTION OF A SIMILAR STATUTORY CONFLICT

In its 2017 opinion in *Page*, our Supreme Court held that the $950 felony threshold that Proposition 47 placed in a general statutory provision extended to a more specific provision. *Page* involved a theft statute, while this case involves the return of stolen property statute. However, we have been provided with no sound basis for distinguishing the two Proposition 47 changes.

Proposition 47 added section 490.2, which stated that "'obtaining any property by theft'" was misdemeanor petty theft if the value of the property taken was no more than

$950. (*Page, supra,* 3 Cal.5th at p. 1179.) The question in *Page* was whether that misdemeanor treatment extended to Vehicle Code section 10851, which criminalized taking or driving a vehicle without the owner's consent. (*Page, supra,* at p. 1180.) Our court had held that "the section 10851 offense remains an alternative felony-misdemeanor (a wobbler) after Proposition 47," so the defendant's conviction did not "come within the terms of section 490.2." (*Id.* at p. 1181.) The Supreme Court disagreed, holding that where a Vehicle Code section 10851 conviction was based on a theft of the vehicle, the $950 threshold from section 490.2 applied, requiring that a theft of such a low-value car was only a misdemeanor. (*Page, supra,* at pp. 1183-1187.)

The foundation of *Page*'s holding was the text of section 490.2. "By its terms," the Supreme Court stated, "Proposition 47's new petty theft provision, section 490.2, covers the theft form of the Vehicle Code section 10851 offense."[3] (*Page, supra,* 3 Cal.5th at p. 1183.) That is, the Court articulated the following syllogism: "section 490.2, subdivision (a), mandates misdemeanor punishment for a defendant who 'obtain[ed] any property by theft' where the property is worth no more than $950. An automobile is personal property. 'As a result, after the passage of Proposition 47, an offender who

[3] Vehicle Code section 10851 criminalizes both theft of a vehicle and the temporary taking of a vehicle, which is not theft. (*Page, supra,* 3 Cal.5th at p. 1183.) Penal Code section 490.2's mandatory misdemeanor treatment extends only the former, because that section only applies to property obtained by theft. (*Page, supra,* at p. 1188.) In the instant case, Penal Code section 496d covers only receipt of a stolen vehicle, fully overlapping with the general crime at issue (section 496(a)), which covers receipt of any stolen property. This case, then, is somewhat simpler than *Page* because it does not have *Page*'s complication of a specific offense that criminalizes some conduct beyond that of the general crime at issue.

obtains a car valued at less than $950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.' [Citation]." (*Page, supra,* at p. 1183.) Put another way, the Court held: "Consistent with [the] straightforward reading of the statutory text . . . obtaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2 and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged." (*Id.* at p. 1187.)

To the extent that the relationship between Penal Code section 490.2 and Vehicle Code section 10851 was "ambiguous," the Supreme Court recognized two other interpretative considerations that counseled for broad application of the provision that Proposition 47 enacted. (*Page*, *supra*, 3 Cal.5th at p. 1187.) First, the Court relied on two uncodified sections of Proposition 47, which stated that it should be construed "'broadly'" and "'liberally'" to effectuate its purposes. (*Page*, *supra*, at p. 1187.) Second, the Court relied on the voters' guide to Proposition 47, wherein the Legislative Analyst explained that under current law the theft of property worth $950 or less "such as cars" could be charged as a felony, but such crimes would no longer be a felony "'solely because of the type of property involved.'" (*Page*, *supra*, at p. 1187.)

IV

PAGE'S REASONING GOVERNS SECTIONS 496(A) and 496D

The same textual interpretation that *Page* applied to Proposition 47's treatment of theft also applies here, to Proposition 47's treatment of receipt of stolen property.

Because section 496(a), like section 490.2, uses the term "any property," *Page*'s precise syllogistic reasoning applies here. That is, section 496(a) applies to the receipt of

"any property" that is stolen and requires misdemeanor treatment where the value of the property does not exceed $950. An automobile, as *Page* stated, falls under the language "any property." "As a result, after the passage of Proposition 47, an offender who obtains a car valued at less than $950" by receiving it stolen "'must be charged with [a misdemeanor] and may not be charged as a felon under any other criminal provision.'" (*Page*, *supra*, 3 Cal.5th at p. 1183.) That is, "[c]onsistent with [the] straightforward reading of the statutory text . . . obtaining an automobile worth $950 or less" by receiving it stolen "constitutes [a misdemeanor] under section [496(a)] and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged." (*Id.* at p. 1187.)

As in *Page*, misdemeanor treatment is supported by Proposition 47's statements that it be construed "'broadly'" and "'liberally'" to effectuate its purposes. (*Page*, *supra*, 3 Cal.5th at p. 1187.) As well, that interpretation is supported by the voters' guide to Proposition 47, wherein the Legislative Analyst explained that receipt of stolen property would "always" be a misdemeanor." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35.) To be sure, the voters' guide stated more specifically that theft of property not exceeding $950 would not be a felony "'solely because of the type of property involved,'" (*Page*, *supra*, at p. 1187), and it did not use those words when it summarized the change to receipt of stolen property. Nevertheless—only a short paragraph after summarizing the theft change—the voters' guide stated that "receiving stolen property worth $950 or less would always be a misdemeanor." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p.

35.) This appears to be simply another way of informing voters of the unconstricted effect of the misdemeanor.

Notably, the case on which the majority relies, *Varner*, itself made the analogy between the return of stolen property statutes (sections 496(a) and 496d) and the theft statutes at issue in *Page* (Pen. Code § 490.2 and Vehicle Code § 10851). In reaching its conclusion that the amendment to the general return of stolen property statute does not extend to a stolen car, *Varner* relied on the logic of a 2016 Court of Appeal opinion, then good law, that presented the same theft issue later addressed in *Page*. That case rejected a defendant's argument "that Vehicle Code section 10851 should be found to be part of Proposition 47 even though it is not listed in the Proposition." (*Varner*, *supra*, 3 Cal.App.5th at pp. 369-370.) When the Supreme Court decided *Page*, however, it disapproved that 2016 case. That is, the case *Varner* relied on by analogy to theft no longer is good law. It has been replaced with *Page*. *Varner* had the analogy right. After *Page*, however, the analogy simply leads to a different conclusion.

Today's majority opinion offers only one reason why *Page*'s reasoning does not apply here, and that is because the petty theft crime, section 490.2, contains an opening clause that is not found in the receipt of stolen property crime, section 496(a). (See Maj. opn., *ante*, at p. 19.) Section 490.2, subdivision (a) starts: "Notwithstanding Section 487 or any other provision of law defining grand theft . . . ." According to this argument, the opening clause shows that voters gave section 490.2 a broader sweep than they gave section 496(a).

Page, however, directly rejected the argument that the "notwithstanding" clause expanded the reach of the operative portion of section 490.2. In *Page*, the Attorney General argued that because Vehicle Code section 10851 was not a provision of law defining grand theft, it fell outside the "notwithstanding" clause, so it was unaffected by section 490.2. (*Page, supra,* 3 Cal.5th at p. 1186.)

Rejecting this argument, the Supreme Court held that the "notwithstanding" clause "does not limit the provision's ameliorative operation," but instead ensures that statutes that define conduct as grand theft do not interfere with the misdemeanor treatment of low-value theft. (*Page, supra,* 3 Cal.5th at p. 1186.) Even where Vehicle Code section 10851 did not define grand theft—and thus was not implicated by the "notwithstanding" clause—the Supreme Court held that the operative provision of Penal Code section 490.2 extended to it: "Nevertheless, section 490.2 plainly indicates that 'after the passage of Proposition 47, "obtaining any property by theft" constitutes petty theft if the stolen property is worth less than $950.' [Citation.] Nothing in the operative language of the subdivision suggests an intent to restrict the universe of covered theft offenses to those offenses that were expressly designated as 'grand theft' offenses before the passage of Proposition 47. On the contrary: 'Omitting the opening clause does not alter the meaning of the remainder of the sentence; the independent clause containing the definition of petty theft stands on its own and means what it says—the act of "obtaining any property by theft where the value . . . does not exceed nine hundred fifty dollars ($950)" constitutes petty theft and must be charged as a misdemeanor.' [Citation.]" (*Page, supra,* at p. 1187.)

Here, then, where there is no "notwithstanding" clause in section 496(a), that section still "stands on its own and means what it says": receiving any stolen property with a value that does not exceed $950 must be charged as a misdemeanor.

As the majority recognizes (Maj. opn., *ante*, at pp. 19-20), one post-*Page* opinion, *People v. Williams* (2018) 23 Cal.App.5th 641 (*Williams*), has disagreed with *Varner* and holds that receiving a stolen vehicle with a value not exceeding $950 must be a misdemeanor. I agree with the result in *Williams* but not all of its analysis.

Williams reasoned that the receipt-of-stolen-automobile statute, section 496d, receives misdemeanor treatment in part because "496d is a theft statute." (*Williams*, *supra*, 23 Cal.App.5th at p. 649.) *Williams* analogized section 496d to another theft statute, section 484e, that the Supreme Court has held covered by section 490.2. (*Williams*, *supra*, at p. 650.) This reasoning appears to indicate that the *Williams* court believed that section 496d fell within section 490.2's definition of misdemeanor petty theft.

The majority today correctly rejects that reasoning. (See Maj. opn., *ante*, at p. 21 [stating that *Page* does not suggest "section 490.2 extends to *theft-related* offenses"]; see also Maj. opn. at p. 18 [noting that *Varner* "rejected the defendant's argument that the voters intended to include section 496d in section 490.2."]) I agree with the majority on this point. I do not think that the receipt of stolen property crime defined in section 496d should be characterized as a "theft offense" for purposes of Proposition 47 and section 490.2. (See, e.g., section 496(a) [indicating that receipt of stolen property is not "theft" by stating that no person can be convicted of both section 496(a) and "the theft of the

same property."]) If Proposition 47 had created *only* section 490.2 petty theft and had *not* amended section 496(a), I do not think section 496d would be covered under *Page*.

But the voters did amend section 496(a), the receipt of stolen property statute. And they made the receipt of $950 or less of stolen property a misdemeanor. *Page*'s construction of the voter's intent based on the initiative's text applies to sections 496(a) and 496d just as it applied to section 490.2 and Vehicle Code 10851. I do not see anything in the majority opinion that shows otherwise. That is why I dissent.

V.

CONCLUSION

This appeal is *Page* with a costume change. When an intervening Supreme Court case applies reasoning that cannot be distinguished from the reasoning of an analogous case from our court, we should abandon our prior reasoning. We have been provided with no sound basis for distinguishing *Page*. For that reason, I would remand this case to the trial court for further proceedings to determine whether this conviction must be a misdemeanor.

RAPHAEL

J.